MAY 3 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 959

VAN CAMP SEA FOOD CO. INC., a corporation, and ANTONIO FRANCISCO,

Petitioners,

vs.

ROBERT A. NORDYKE,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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vs.

ROBERT A. NORDYKE,

Respondent.

PETITION FOR WRIT.

To the Honorable the Supreme Court of the United States, the Honorable Chief Justice and the Honorable Associated Justices Thereof:

May it please the Court:

The undersigned on behalf of Van Camp Sea Food Co. Inc., a corporation, and Antonio Francisco, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above-entitled cause, numbered therein No. 10392.

Opinion Below.

The opinion of the court below [R. 237-252] is reported in 140 F. (2d) 902. The case having been tried to a jury there was no opinion in the District Court (Southern District of California).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered February 11, 1944 [R. 236]. A petition for rehearing was seasonably made, entertained and denied on April 5, 1944 [R. 253].

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 347).

Summary and Statement of Matters Involved.

Robert A. Nordyke was employed by Van Camp Sea Food Co. on August 1st, 1941, as a radio operator and fisherman aboard the Madeirense, a fishing vessel approximately 125 feet long, about 330 tons gross, and 200 tons tuna carrying capacity, leaving the Port of San Diego, on or about August 27, 1941 [R. 43].

The contract was a written contract consisting of the Shipping Articles [R. 81]. Respondent, before signing the Shipping Articles, talked with petitioner Antonio Francisco, who was the master of the vessel [R. 45]. The vessel was owned by Van Camp Sea Food Co., Antonio Francisco and several other members of the crew [R. 45]. In September of 1941, Antonio Francisco, the master of the Madeirense, was fishing on a share basis. The amount of money he made depended upon the amount of fish caught and he received his money in accordance with the quantity [R. 202].

On September 14, 1942, near the Galapagos Islands, respondent, while fishing, was thrown up against the fishing rail when a Tuna hit the fishing line, at which time respondent and one Pires were handling one line. Respondent's right wrist was injured [R. 46-47].

Immediately after the injury, the chief engineer took respondent's arm and tried to pull it into place. It was out of place. A few minutes after that the captain came down and did the same thing three or four times [R. 51]. At noon time on said day, respondent sent a telegraph message to the United States Marine Hospital at San Francisco, describing the injury and received a reply within an hour [R. 52-53]. The message from the United States Marine Hospital diagnosed the injury as an imperfect broken wrist bone and advised the master "to get immovable wrist by placing a thin piece of box paste under surface of arm from elbow to tips of fingers and bind it in place with roller. Bandages not too tight wath *(sic)* circulation. Place arm in ice pack aspirine gash ten minutes every four hours. Make for nearest port for X-ray and proper medical care" [R. 55].

The lower court states that "the evidence reveals that the instructions contained within the wireless message relating to the treatment of the injury were substantially carried out by the master" [R. 245].

The boat fished all day September 14th and all day September 15th. I made complaint to the captain as to the pain. He asked me on a number of occasions how much it hurt. I told him it hurt very badly, during the day and during the night. I couldn't sleep. I was walking up and down the deck, and the captain on a number of occasions came out from his room and walked with me. About this time I wanted the master to go to the Galapagos Island where he and I both knew that there was an intern at Wreck Bay. We did go to San Cristobal, Galapagos. We arrived there on the morning of the 16th. A doctor came aboard. The doctor said it very definitely was broken but he did not have any X-ray or

any equipment to handle any such thing. He told me the best thing to do was to go somewhere immediately where there was an X-ray, where I could get medical attention [Respondent's testimony, R. 57-59].

When I got to San Cristobal, the Ecuadorean doctor provided there came aboard at that port. He touched my wrist with his hand; he took the bandages off. He felt around, to see what was the matter. Then he put a splint on [Respondent's testimony, R. 98].

I think it was after I had seen the port doctor at San Cristobal that I sent a wireless message to Van Camp at San Diego [Respondent's testimony, R. 98].

The message is as follows: "Radio operator Madeirense broken arm. Belle ready to go home. If all right may he go with him at Galapagos. Answer immediately" [Respondent's testimony, R. 100].

Soon after the vessel arrived at San Cristobal I sent the wireless to the Van Camp at San Diego asking if I could come back to San Diego on the Belle of Portugal [Respondent's testimony, R. 129].

The answer came back that it was all right to come home on the Belle of Portugal provided I had a master's certificate with a statement of the injury [Respondent's testimony, R. 61].

A little later that night, I believe, we met a United States destroyer. It pulled up alongside and the only medical man they had aboard was a pharmacist's mate. The pharmacist's mate aboard the destroyer told the captain and several others, in his presence, that if it were left for any amount of time, I think he said about two weeks, it would set and might cause further complications [Respondent's testimony, R. 63-64].

He (the pharmacist's mate) said it was definitely broken, and it should be taken into Panama or some near port, as soon as possible. He did approximately the same thing that was done before. He took off the splint and bandage and put on a slightly more flexible one of his own, of some sort. He said he had no X-ray or material to work with. He gave me codein or something of that sort to deaden the pain, then the destroyer left [Respondent's testimony, R. 62-63].

I might have said to Dr. William McLellan, with whom I talked at the United States Public Health Service in San Diego on October 11, 1941, that "he (the pharmacist's mate) did a wonderful job putting on a splint" [Respondent's testimony, R. 156-157].

When I was having my communication with the radio operator of the Belle of Portugal the message which came in to me from the operator of the Belle of Portugal was given by me to the master of the Madeirense. I believe I told the master of the Madeirense that the Madeirense would meet the Belle of Portugal at either 11 a. m. or 12 o'clock noon on a certain day at a certain place. Immediately upon receiving the message from the Belle of Portugal and telling the master about it, the Madeirense proceeded toward the place where I said the Belle of Portugal would be at noon time on the day fixed. The Madeirense proceeded to that place at a speed in excess of the normal cruising speed for that vessel; it proceeded at forced draft. When the Madeirense arrived at the place where I understood it was to meet the Belle of Portugal at the appointed time, the Belle of Portugal was not there [Respondent's testimony, R. 120-121].

I told the master of the Madeirense that the mix-up resulted from my conclusion that I was merely to get in

touch by radio with the Belle of Portugal whereas the Belle of Portugal understood that I was to be transferred aboard the Belle of Portugal at noon time on that day [Respondent's testimony, R. 124-125].

About five or six days following the injury, the severe pain subsided and during the balance of the time up to the time that I got to San Diego, I wasn't in what I would call any acute distress; just a matter of the throbbing, etc. [Respondent's testimony, R. 125].

Subsequent to five or six days following the date of the accident I did not complain to anybody about my pain [Respondent's testimony, R. 127]. I did not ask the master to take me to the Canal Zone [Respondent's testimony, R. 123-124].

I once said to Mr. Pires (a fellow fisherman) that I did not like to ask the captain to take me to the Canal Zone from the fishing grounds. I mentioned the subject that fishing was good, and that the vessel was on the fishing grounds, as one of my reasons for not wanting to suggest to the captain that he take me to the Canal Zone. That conversation was before I missed the Belle of Portugal [Respondent's testimony, R. 127-128].

I did not ask the master of the Madeirense to take me on the Madeirense from the fishing grounds or wherever I was to San Diego or any place else [Respondent's testimony, R. 132].

Within three days after the Belle of Portugal had been missed I stated in substance to Mr. L. F. Cunningham, on the Madeirense, that I did not want to be put on any other boat to go back to San Diego or anywhere else and that I was satisfied to stay on board the Madeirense until it got back to San Diego [Respondent's testimony, R. 132-133].

From a period of time three days after the meeting of the Belle of Portugal had been missed, it is true that I generally throughout told the members of the crew on the Madeirense that I thought I was getting along all right, and that I would just as soon stay with the Madeirense until I got back to San Digeo [Respondent's testimony, R. 133].

At the time I went to the facilities of the United States Public Health Service in San Diego I saw a doctor. The doctor sent me to an X-ray place in San Diego to have X-rays taken of my injured arm. According to my recollection the X-ray was taken of the arm which had been in a splint. He told me to get the X-rays and then he would be able to work on me on Tuesday following; he thought he could by that time; I got the X-rays and then decided to go to my own doctor. I don't think the United States Public Health Service doctor in San Diego said anything about the facilities there at San Diego. I believe he said that the reason he was not going to be able to work on me until the following Tuesday was that the facilities of the United States Public Health Service was overcrowded. I don't know. I don't remember his reason exactly, but I have a feeling that it was because it were overcrowded. I am not sure [Respondent's testimony, R. 152-153].

The only evidence of the required competency (that of a qualified surgeon) as to the result of the medical care actually furnished up to the time of respondent's arrival in San Diego is the testimony of the commanding officer of the United States Public Health Service in the San Diego district, William Edwin McLellan.

The testimony of the *doctor*, William Edwin McLellan, which is *uncontradicted* includes the following perti-

nent statements of *expert* opinion as to the effectiveness of the actual medical care that was furnished:

1. His case did not require any hospital attention whatever at the time of my examination [R. 160].

2. The X-ray that was then taken of Nordyke's ulna bone pursuant to my direction shows no pathology of any kind. The X-ray was taken by a man of national reputation who specializes in X-rays. His interpretation was "no pathology in the arm or wrist" [R. 160-161].

3. "10/11/41.—Report of X-ray examination of *right* forearm: A P and lateral projections of lower two-thirds of the right forearm and wrist show no evidence of bone or joint injury.

"Diagnosis: 1. Injury, old, right arm" [R. 165].

4. When a man suffers an injury of the kind Mr. Nordyke complained of, the first thing that ought to be done, if there is no hemorrhage, is "you *immobilize* the part, so he doesn't use it; then you alleviate the *pain* in many different ways" [R. 175].

5. "Going back to the X-ray that was taken by the official source through your instrumentality, is there anything in that X-ray that indicates to you that this plaintiff was *then* suffering from any serious injury of any kind or character A. I see no pathological condition of any kind" [R. 181].

6. "Q. Look at that X-ray. Is it your opinion from the X-ray that this plaintiff had suffered any serious bone injury within a month of the time that X-ray was taken? A. No, sir. I see nothing there. You ask me as to pathology. I will say this down in here is what we call a little mouse." That is a rheumatoid condition, usually an arthritic condition. There isn't anything that indi-

cates to me that this man has sustained any *serious* injury at all within a month of the time the X-ray was taken [R. 181].

7. When Mr. Nordyke was examined on October 11, 1941, his right forearm was in a splint made of makeshift materials consisting of wire, etc., but substantial enough. He had had the existing splint on for the preceding two weeks [R. 165].

Dr. McLellan also testified that respondent "complimented the pharmacist's mate extensively" [R. 160].

The only medical testimony introduced by respondent was that given by Dr. Alfred E. Gallant. Dr. Gallant is the individual referred to in the opinion of the court below as "an admittedly qualified orthopedic specialist who examined Nordyke a few days before the trial" [R. 247]. Over the objection of petitioners that the evidence was hearsay and did not constitute proof of the existence of the alleged happening, the trial court permitted said doctor to testify as follows:

1. The doctor at San Cristobal, Galapagos, made no attempt to determine the exact nature of the fracture.

2. Owing to the crowded condition in the United States Public Health Service in San Diego, respondent went to his home in San Jose.

3. Radiograph taken at San Jose showed an injury to the lower end of the right ulna and it was necessary to remove a piece of this bone [R. 104].

Over the objection of petitioners that the document was not competent proof of any fact, the trial court permitted respondent to introduce as substantive evidence a letter written by Dr. Gallant to one of respondent's counsel. Said letter contains the following statements:

1. He (respondent) was examined later by a doctor at San Cristobal, Galapagos, who applied a splint but made no attempt to determine the exact nature of the fracture.

2. Owing to crowded condition in the United States Public Health Service in San Diego, he (respondent) went to his home in San Jose.

3. Radiographs (taken in San Jose) snowed an injury to the lower end of the right ulna and it was necessary to remove a piece of this bone [R. 105-107].

The trial court permitted said doctor to testify as follows:

1. That the ideal time when a person suffering a fracture should receive medical care is as soon as possible.

2. When the fracture occurs the taking of radiographs at once is standard practice today or malpractice is in the offing [R. 114].

3. "Q. If this injury had been *properly* treated, *X-rayed* and *properly* treated three days after it occurred, what would your opinion be as to whether he would have suffered the permanent disability which now appears? * * * A. If it were *properly* reduced, treated—put it all in the word 'treatment' I don't think there would have been any permanent disability" [R. 116-117].

4. "Q. What is standard and proper practice, doctor, where a fracture has occurred * * * A. The ideal treatment, according to circumstances, as stated before, is, if *X-rays* are available, to take pictures, and if not available immediately, to get *them* as soon as possible * * * Q. By Mr. Resner: That is, get *proper* treatment as soon as you can get to a place A. Get to a place where you can get the *right* treatment" [R. 117-118].

The doctor also testified: Respondent did not give me any X-rays purportedly taken in San Jose. As a matter of fact, I didn't see any X-rays at all except the one that I ordered taken. In order for me to tell from a surgical standpoint what the exact injury was on board this vessel, I would have to see either the patient at the time of the injury or an X-ray exhibiting the bony condition at the time [R. 119].

The trial court instructed the jury, over the objection of the petitioners, as follows:

1. "The master, vessel, and its owners are legally obliged to furnish *proper* medical care to the injured seaman within the earliest possible time, even though the seaman does not request care" [R. 226]. (Emphasis added.)

2. "The plaintiff claims in this case that his present condition is due to, and has been caused by the failure and neglect of the defendant to provide him with *adequate* and *competent* medical and *hospital* services at the earliest reasonable opportunity. If the plaintiff has proved to your satisfaction, and by a preponderance of the evidence, under all the facts and circumstances of the case, that the defendant failed to supply him with *proper* medical care and attention at the earliest reasonable opportunity and that as a result thereof the use and strength of his hand and wrist have been lost in whole or in part due to *such* negligent failure on the part of the defendant, the plaintiff has made out a case and is entitled as a matter of law to damages from the defendants" [R. 225-226]. (Emphasis added.)

3. "If you find from all the facts and circumstances in this case that said Francisco was negligent in failing to provide plaintiff with *proper* medical care, * * *

the defendant company is liable for the consequences of Francisco's negligence" [R. 226]. (Emphasis added.)

4. "In this case, regardless of whether or not you decide that defendant was negligent, you are instructed to award plaintiff maintenance. In other words, a seaman such as plaintiff, who is taken sick in the service of a vessel, is entitled to maintenance from the defendant shipowner. Maintenance is awarded regardless of fault on defendant's part and even if defendant is not at fault. Maintenance is to include such a sum of money as is reasonably necessary to maintain plaintiff until he was able to return to work" [R. 226-227].

The trial court refused to instruct the jury at the request of petitioners that "the only duty which rested upon the master of the vessel in the case at bar was to exercise that amount of care and judgment which would have been exercised under all of the circumstances shown by the evidence by an ordinarily prudent person not possessing the knowledge or skill of a physician or surgeon" [R. 220-222].

Questions Presented.

1. Whether a cause of action for compensatory damages resulting from a failure of the *master* of a vessel to furnish medical care is created or affected by the Jones Act, or has its sole and exclusive origin in the general maritime law?

2. In the absence of allegations and proof showing diversity of citizenship, may a seaman maintain an action for damages at law in a United States District Court, when his claim is predicated upon an alleged negligent failure on the part of the master of a vessel to provide medical care?

3. In the absence of allegations and proof showing the existence of the required jurisdictional amount and diversity of citizenship, may a seaman maintain an action at law in a United States District Court for damages on account of a breach, *without* negligence, of the contractual duty to provide medical care?

4. Is the employer of a seaman who is injured or suffers illness in the service of the ship, required at his peril, to provide *proper, adequate* and *competent* medical care and attention or is the contractual duty confined to and discharged by furnishing ordinary medical care?

5. The trial court erroneously instructed the jury at the request of respondent and erroneously failed to give instructions at the request of petitioners.

6. The evidence as to the first cause of action fails to establish actionable negligence on the part of the master of the vessel and the jury should have been instructed to find a verdict for the defendants on the first cause of action.

7. Is a *fisherman* a *merchant marine* seaman within the meaning of the word "seaman" as contained in the Jones Act?

Reasons for Granting the Writ.

1. The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

2. The Circuit Court of Appeals has decided a vital question in a way probably in conflict with applicable decisions of the United States Supreme Court.

3. The Circuit Court of Appeals has rendered its decision in conflict with an earliest decision of the same court

on the same question of law with reference to jurisdiction as to the second cause of action.

4. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's power of supervision.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted, to review those portions of the judgment of the court below embraced within the questions presented, *supra*.

Dated: Los Angeles, California, April 24th, 1944.

LASHER B. GALLAGHER,
Attorney for Petitioners.

Certificate.

I hereby certify that in my judgment this petition is well founded. I also certify that this petition is not interposed for delay.

LASHER B. GALLAGHER,
Attorney for Petitioners.